Forester Beverage Corporation *and* Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 11-CA-8048, 11-CA-8713, 11-CA-9084, and 11-CA-9176

November 1, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 23, 1981, Administrative Law Judge David L. Evans issued the attached Decision in this proceeding.[1] Thereafter, Respondent and the General Counsel filed exceptions and briefs in support thereof, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[2] and has decided to affirm the rulings, findings,[3] and conclusions[4] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[5]

The General Counsel excepts to the Administrative Law Judge's failure to find that Respondent violated Section 8(a)(3) when it refused to offer newly created positions resulting from the expansion of the bargaining unit to qualified strikers who had unconditionally offered to return to work. We find merit in the General Counsel's exception.

On August 22, 1977, employees in the bargaining unit commenced an economic strike. On November 21, 1977, the Union, on behalf of the strikers, made an unconditional offer to return to work. In January and March 1978, two employees who had been hired as permanent replacements prior to the strikers' unconditional offer to return to work terminated their employment. Respondent hired two new employees, Ricky Bullis and Oliver Eugene Gant, to fill these vacancies.

A complaint issued in Case 11-CA-7619 alleging that Respondent had violated the Act by refusing to reinstate two strikers who had unconditionally offered to return to work to fill the vacancies created by the permanent replacements' departure. At the hearing on the complaint, the parties agreed to settle the case. The settlement agreement provided, *inter alia*, that Respondent would:

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[1] On March 9, 1981, the Administrative Law Judge issued an "Erratum" to his Decision, to which no party has excepted.

[2] Following the filing of briefs, Respondent requested the Board to take notice of a recently issued court case. In considering the exceptions to the Administrative Law Judge's Decision, we have examined the case to which Respondent refers.

[3] The Administrative Law Judge found that the granting of unilateral wage increases, as well as certain other unilateral changes instituted in May 1980, violated Sec. 8(a)(5) of the Act, based on his conclusion that *Telautograph Corporation*, 199 NLRB 892 (1972), does not license unilateral actions, as opposed to a refusal to enter plenary contract negotiations, in the face of a pending decertification petition. (Although *Telautograph* has been overruled by the Board in *Dresser Industries, Inc.*, 264 NLRB No. 145 (1982), its possible application has nevertheless been considered here since the Board has determined to apply the rule announced in *Dresser* on a prospective basis only.) While we agree that Respondent's unilateral changes were violative of Sec. 8(a)(5), we note that the *Telautograph* case applies only in a context free of any other unfair labor practices. See *Autoprod, Inc.*, 223 NLRB 773 (1976). Since Respondent here did engage in other unlawful conduct prior to the filing of the decertification petition, as discussed *infra*, *Telautograph* does not apply to exonerate any unilateral actions occurring after the filing of the decertification petition.

Respondent includes in its brief to the Board an employee petition, claiming it was attached to a decertification petition and filed in support thereof, and argues that it is part of the record since the Administrative Law Judge took official notice of the decertification petition. The General Counsel filed a motion to reject exhibits and strike, Respondent filed a response to the General Counsel's motion, and the General Counsel filed a response to Respondent's response. We note that the only purpose for which Respondent asked the Administrative Law Judge to take official notice of the decertification petition was to show "that it [the decertification petition] is on file." For the following reasons, we hereby strike the employee petition and all references to it.

A showing of interest is for administrative purposes only and is not identical to a decertification petition (nor is it served on the parties along with a decertification petition). When the Administrative Law Judge accepted Respondent's request that he take official notice of the decertification petition, he in fact did not make the employee petition part of the record. Further, we note that the limited purpose for which Respondent requested the Administrative Law Judge to take official notice of the decertification petition provides no basis at all for considering the employee petition. Finally, no foundation exists in the record to establish the employee petition's authenticity (a burden resting on a movant) nor its validity (into which an opposing party is entitled to inquire once authenticity has been established). See, e.g., *Gordonsville Industries, Inc.*, 252 NLRB 563, 597-602 (1980). We therefore are unable to consider the employee petition for any purpose.

[4] In view of the finding that Respondent did not validly offer employee Clonch reinstatement on October 3, 1979, we believe it unnecessary to pass on the Administrative Law Judge's discussion regarding Respondent's failure to offer the draft salesman position to employee Staley on October 4, 1979, or on the Administrative Law Judge's interpretation of *New Era Electric Cooperative, Inc.*, 217 NLRB 477 (1975). Under the circumstances of this case, our adoption of the Administrative Law Judge's finding that Clonch was not validly offered reinstatement on October 3, 1979, effectively moots the issue of whether Respondent should have offered that same job to Staley on October 4, 1979.

[5] We note and correct accordingly the following inadvertent errors in the Administrative Law Judge's Decision. In sec. III,A, par. 2, August 19, 1977, should be September 19, 1977; in sec. III,A, par. 3, September 27, 1977, should be September 19, 1977; in sec. III,B, par. 1, Case 11-CA-9619 should be Case 11-CA-7619; in sec. III,F, par. 1, June 2 should be June 16, and July 3 should be July 21; in Conclusion of Law 5(b), May 12, 1980, should be May 19, 1980; and, in Conclusion of Law 7, May 12, 1980, should be May 19, 1980. Also, we note that the section of the Administrative Law Judge's Decision entitled "The Remedy" inadvertently omits employee Gryder from the requirement that Respondent make whole certain named individuals. We hereby correct this error accordingly.

In addition to recommending an Order to remedy specific 8(a)(5) violations, the Administrative Law Judge provided for a general bargaining order. However, the complaint did not allege, nor did the Administrative Law Judge find, that Respondent generally refused to bargain with the Union. We shall therefore delete par. 2(b) of the Administrative Law Judge's recommended Order. See, e.g., *Alexander Linn Hospital Association*, 244 NLRB 387 (1979).

> . . . make whole and offer reinstatement to . . . Kenneth Roy Huffman and Ricky J. Pierce for any losses they may have suffered by [the] alleged refusal to reinstate them . . . [and] offer full reinstatement to [the] employees who were on strike November 30, 1977, and before, and who were permanently replaced before that date, as their former or substantially similar positions become available, and before hiring new employees to fill [those] positions.

Following the settlement agreement, on December 5, 1978, Respondent reinstated Huffman and Pierce, but also retained Bullis and Gant. The Administrative Law Judge found that nothing in the settlement agreement required discharging any employees, and that Respondent's reinstating of Huffman and Pierce "appears to be nothing more than a concession made in an attempt to settle the charges" pending at the time of the hearing. We disagree with the Administrative Law Judge's conclusion.

An economic striker is entitled to reinstatement to his former job or to a substantially equivalent job upon an unconditional offer to return to work, unless an employer has hired permanent replacements prior to the offer to return to work. *The Laidlaw Corporation*, 171 NLRB 1366, 1369–70 (1968), enfd. 414 F.2d 99 (7th Cir. 1969); *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938). And, even if an employer has hired permanent replacements, it must, when and if such a job becomes available for which a striker is qualified, offer that job to an economic striker. Thus, to place a new employee rather than a striker awaiting reinstatement in a vacant position (for which the striker is qualified) created by the departure of a permanent replacement violates the Act. *Fire Alert Company*, 207 NLRB 885, 886 (1973); *The Laidlaw Corporation, supra.*

Regarding reinstatement rights, we perceive no legal difference between a vacancy created by the departure of a permanent replacement and an opening resulting from the expansion of the unit. A qualified unreinstated striker is entitled to an offer of reinstatement to the newly created position resulting from the expansion of the unit, just as he is entitled to an offer of reinstatement to a position vacated by a permanent replacement, before an employer may recruit a new employee for the newly created position.

We find that, when Respondent reinstated Huffman and Pierce while retaining Bullis and Gant, it essentially expanded the size of the unit by two. Respondent was obligated to offer the two newly created positions to strikers awaiting reinstatement before placing in those positions new employees hired after the strikers' unconditional offer to return to work.[6] We therefore find that Respondent, when it created two new positions on December 5, 1978, should have first offered those positions to unreinstated strikers Kenneth Ray Huffman and Steve Staley, who occupied positions substantially equivalent to those prior to the strike. Accordingly, we shall order that Respondent make these employees whole for any loss of earnings they may have suffered by reason of Respondent's discriminatory failure to reinstate them.[7]

AMENDED CONCLUSIONS OF LAW

We amend the Administrative Law Judge's Conclusions of Law as follows:

1. Substitute the following for Conclusion of Law 5(b):

"(b) Altering existing employee delivery routes, creating new employee delivery routes, and removing the helper from package sales delivery routes on or about May 19, 1980."

2. Substitute the following for Conclusion of Law 7:

"7. Respondent violated Section 8(a)(1) and (3) of the Act when, beginning May 19, 1980, it refused to offer vacancies created by new jobs and the departure of strike replacements to qualified strikers Benjamin F. Staley, Eddie Teague, and Robert Gryder, who were then awaiting reinstatement in preference to strike replacements who were then on the payroll."

3. Insert the following as Conclusion of Law 8, and renumber the subsequent Conclusion of Law accordingly:

"8. Respondent violated Section 8(a)(1) and (3) of the Act when, on December 5, 1978, it refused to offer newly created positions resulting from the expansion of the unit to qualified strikers awaiting reinstatement in preference to employees hired subsequent to November 21, 1977."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended

[6] Absent specific factual proof that the new jobs resulting from the expansion of the work force were not created in response to general business needs, we decline to speculate that Respondent's expansion departed from normal business practices. Cf. *Neptune Water Meter Company, a Division of Neptune International Corporation* v. *N.L.R.B.*, 551 F.2d 568, 570 (4th Cir. 1977) (court would not assume something it knew to be false: that businessmen hire and fire without any reason at all).

[7] The record indicates that, in or about October 1979, Respondent offered Kenneth Ray Huffman and Steve Staley reinstatement to their former positions. The two individuals declined these offers. Of course, Respondent's backpay obligations would be tolled when the two employees declined the valid offers of reinstatement.

Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Forester Beverage Corporation, North Wilkesboro, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(d) and reletter the subsequent paragraphs accordingly:

"(d) Refusing to offer newly created positions resulting from the expansion of the unit to qualified strikers awaiting reinstatement in preference to employees hired subsequent to November 21, 1977."

2. Substitute the following for paragraph 2(b):

"(b) Make Kenneth Ray Huffman and Steve Staley whole for any loss of earnings they may have suffered by reason of the discriminatory failure to reinstate them on December 5, 1978, in the manner set forth in the section of the Administrative Law Judge's Decision entitled 'The Remedy,' as modified herein."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had the chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice. We intend to abide by the following:

WE WILL NOT refuse to bargain collectively with the Union by unilaterally changing or eliminating our employees' wages, hours, or other terms and conditions of employment.

WE WILL NOT decline to offer initial job vacancies created by new jobs or the departure of strike replacements to qualified strikers awaiting reinstatement in preference to strike replacements on the payroll.

WE WILL NOT refuse to offer newly created positions resulting from the expansion of the unit to qualified strikers awaiting reinstatement in preference to employees hired subsequent to November 21, 1977.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer employees Benjamin F. Staley, Eddie E. Teague, and Robert Gryder immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of earnings they may have suffered as a result of our discrimination against them, with interest.

WE WILL make whole Dennis W. Clonch for any losses of pay or other benefits which he may have suffered as a result of our discrimination against him, with interest.

WE WILL make Kenneth Ray Huffman and Steve Staley whole for any loss of earnings they may have suffered by reason of our discrimination against them, with interest.

WE WILL, upon the Union's request, rescind any or all changes in terms and conditions of employment made by us after May 1, 1980, which were unilateral actions in derogation of the status of the Union as the collective-bargaining representative.

FORESTER BEVERAGE CORPORATION

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge: Upon charges filed by Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), against Forester Beverage Corporation (herein called Respondent), the General Counsel issued a complaint alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, herein called the Act. Respondent filed an answer to the complaint denying the commission of any unfair labor practices. Hearing was held before me on August 18 and 19, 1980. The General Counsel and Respondent have filed briefs which have been carefully considered.

Upon the entire record and from my observation of the demeanor of the witnesses and the inherent probabilities and improbabilities of the testimony of each witness, I make the following:

FINDINGS AND CONCLUSIONS

I. THE OPERATIONS OF RESPONDENT

Respondent is and has been at all times material herein a North Carolina corporation with a facility located in North Wilkesboro, North Carolina, where it is engaged in the wholesale distribution of beer. During the 12 months preceding issuance of the original complaint herein, a representative period, Respondent received at its North Wilkesboro, North Carolina, facility, directly from suppliers located outside the State of North Carolina, beverages valued in excess of $50,000. The complaint alleges, Respondent admits, and I find that Respondent is

an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent is a beer distributorship which services several counties in north central North Carolina. It has employed four relevant classifications of employees in the operation of that business: truckdriver-salesmen of packaged beer (herein called package salesmen); truckdriver-salesmen of draft beer (herein called draft salesmen); helpers on the package truck; and warehousemen.

At the time the events of this case arose, 1976, the following individuals were employed in the classification set opposite their respective names and each individual's date of hire is listed in the third column:

Employee	*Classification*	*Date Hired*
Clyde C. Huffman	Warehousemen	10/10/47
Benjamin F. Staley	Package salesman	8/03/67
Edward E. Teague	Package salesman	3/01/69
Ricky J. Pierce	Helper	7/28/72
Robert L. Gryder	Package Salesman	12/01/72
Kenneth Roy Huffman	Helper	3/01/73
Dennis W. Clonch	Draft Salesman	8/06/73
Kenneth Ray Huffman	Helper	8/13/73
Steve W. Staley	Helper	10/08/75

At all material times the following persons have been supervisors of Respondent within Section 2(11) of the Act: Jim Whittington, president and general manager; Dean Johnson, supervisor; Joan Padley and Jennifer Green, coowners.

A. *Bargaining and Strike*

On May 14, 1976, after a Board-conducted election, the Union was certified as the collective-bargaining representative of the above employees. Bargaining began on June 3, 1976. On August 22, 1977, the employees began an economic strike. Eight of the nine above-listed employees joined the strike, Clyde Huffman being the only exception. Respondent began immediately hiring permanent replacements and made Gary LeHardy a permanent employee in the position of package salesman. (LeHardy had been hired as a "general duty" day laborer on August 18, 1977, according to Respondent's payroll records.) Seven other permanent replacements were hired by September 12, 1977, to bring the total employee complement back to nine.

Negotiations continued, the last meeting of which was conducted on August 19, 1977. Agreement was reached except for disagreement on one issue: The Union refused to agree to Respondent's last package proposal unless all the permanent replacements were terminated (immediately or in the near future) and the strikers reinstated. Respondent refused to terminate the replacements and the strike continued. These respective positions were repeated in subsequent phone calls between Respondent's attorney Bradley and Union Representative Sherrill without change by either side.[1]

Since, after bargaining in good faith, the parties reached a deadlock in the negotiations on September 27, 1977, the parties were then at a state of impasse, as I find and conclude.

On November 21, 1977, the Union, on behalf of the strikers, made an unconditional offer to return to work. None of the offers were then accepted.

On January 6, 1978, replacement warehouseman Dale Junior Eller quit and was replaced on January 10, 1978, by Ricky Bullis. Bullis is listed as a "warehouseman-helper" on Respondent's records; while the positions were nominally combined, Bullis was a helper on the package truck of replacement Bell's truck. Replacement Jimmy Dorsett, a warehousemen, quit on March 3, 1978, and on May 1, 1978, Respondent hired Oliver Eugene Gant also as a "warehouseman-helper" to replace Dorsett.

B. *Failure To Discharge Strikers After Settlement Agreement*

On November 20, 1978, after complaint had issued in Cases 11-CA-7182 and 11-CA-9619, a hearing was opened before Administrative Law Judge Alvin Leiberman. The parties entered a settlement agreement which provides that Respondent would:

> . . . make whole and offer reinstatement to . . . Kenneth Roy Huffman and Ricky J. Pierce for any losses they may have suffered by [the] alleged refusal to reinstate them . . . [and] offer full reinstatement to [all] employees who were on strike November 30, 1977, and before, and who were permanently replaced before that date, as their former and substantially similar positions become available, and before hiring new employees to fill [those] positions.

The agreement did not refer to the replacements of Pierce and Huffman. Specifically, the settlement agreement did not expressly require the discharge of anyone. Huffman and Pierce were reinstated and worked as warehousemen again. No strike replacements were discharged when they returned to work, and the employee complement rose to 11.

The General Counsel states in his brief: "When, on December 5, 1978, Respondent reinstated Ricky Pierce and Kenneth Roy Huffman, two of the initial eight economic strikers, Respondent failed to simultaneously terminate its two employees Ricky Bullis and Gene Gant whom it had hired after the unconditional offer to the employer." In advancing this agreement, the General Counsel contends that Respondent's failure to discharge two persons when it agreed in settlement to reinstate Huffman and Pierce adversely affected the *Laidlaw*[2]

[1] In reaching the factual findings contained in this paragraph, I credit Bradley over Sherrill who, disingenuously I believe, claimed inability to remember demanding the discharge of replacements.

[2] *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969).

rights of the other employees who were then available and could have performed the work of helpers of warehousemen.

There is nothing in the settlement agreement which requires the discharge of any employees. Respondent's putting Kenneth Roy Huffman and Ricky Pierce back on the payroll appears to be nothing more than a concession made in an attempt to settle the charges which were then outstanding. The strikers were economic strikers, not unfair labor practice strikers, and there was no duty to discharge anyone simply because Respondent had entered a settlement agreement attempting to dispose of the claim of two economic strikers.

Accordingly, I find and conclude that the General Counsel has not proven a violation of the Act by Respondent's failure to discharge any employees when Kenneth Roy Huffman and Ricky Pierce were reinstated.

C. *Failure To Reinstate Clonch on October 3, 1979*

On August 27, 1977, W. D. Anthony was hired to replace the then striking Clonch as draft salesman. Anthony quit effective October 5, 1979.

On October 3, 1979,[3] Whittington and Johnson went to a service station jointly owned by Clonch and his father. Whittington and Johnson offered Clonch reinstatement on that date. There is a sharp factual dispute on one point of the conversation: Did Clonch agree to a 24-hour limit on the time he had to consider the offer? Clonch testified:

> A. Jim Whittington told me that he had come by the station to offer me reinstatement as the Draft Beer Salesman at Forester Beverage, and I asked him "How long did I have before I could make up my mind, and he replied and said: "24 hours"; and I told him, I said, "Well, Jim, I have established a business here." I said: "I have a half ownership in this service station, and there is no way that I could possibly give you an answer in 24 hours" and so then Dean Johnson said, "yes, 24 hours"; and so, I went and asked him, asked him again, you know, "Can I have more time then that," and he said, "No, I need to know tomorrow"; and so, I said, "Well, I will have to go talk with my Dad and my wife, because I have got this business, and I will try to let you know something, but I said "24 hours is just not enough time for me."

Whittington testified:

> A. Dean Johnson, our draft supervisor, and myself drove to this service station; this was October third, 1979; and I informed Mr. Clonch that we were there to offer him his job back as Draft Beer Salesman at Forester Beverage.
>
> The first question he asked me was: What was the pay?
>
> I told him, and he said, "Jim, I don't know whether you know it or not, I am co-owner of this station with my father; if I should decide to leave, it would create a problem with my father. Therefore, I would like to have time to discuss this with my father and my wife, and then return to you later; and he said, "when do you have to have an answer?"
>
> I said, "would 24 hours be sufficient" and he said "it would." And so, we thanked Mr. Clonch and drove back to the office. It was approximately 3:00 p.m. in the afternoon.

Johnson testified essentially the same as Whittington.

On October 4, 1979, Clonch went to Whittington's office. Clonch testified that, while he and Whittington were alone:

> A. Well, I went down and I told Jim, I said, I explained to him one more time that I did have half-ownership in the business and that 24 hours wasn't enought time for me to find somebody to run the service station for me or for me to get out of it, and he agreed and he still insisted that the 24 hours he had to know that he had to know that evening; and I said, "Well, there is no way"; and he said that "he was sorry and that he understood that I could not find anybody in that length of time."

Whittington's testimony is completely different:

> A. Yes, sir, I heard from Mr. Clonch the following morning, October 4th at 10:30 a.m. He came to my office and said that "he had discussed this with his wife, and his father, and the hardship that it would create leaving his father, he decided to stay in the service station business." He also elaborated on the amount of money that he was making at the station and that was basically the conversation. I thanked him and he left at approximately 11:00 a.m.

On October 8, 1979, Whittington sent a letter to Clonch stating:

> This is to confirm our offer made to you on 3 October 1979, of reinstatement as an employee and your declining of that office [sic] on 4 October 1979.

Respondent did not offer the draft salesman job to any other unreinstated former striker. Instead it promoted Kenneth Roy Huffman from warehouseman-helper to that job. No one was hired to recalled to replace Huffman as warehouseman-helper. Huffman remained the draft salesman until the time of the hearing.

On December 28, the complaint issued alleging that Respondent had failed properly to reinstate Clonch.[4] On February 22, Whittington sent Clonch a letter stating:

[3] There was a great deal of conflict on this date which, ultimately, would be important only for the purposes of backpay; therefore, a full discussion of how I arrived at this date is unnecessary. The General Counsel had extensively briefed the question, but, fully appreciating the credibility problems which are intrinsic in Respondent's testimony on the point, I do credit that testimony and conclude that these events occurred on October 3 and 4, 1979.

[4] The phrasing of the specific allegation will be discussed *infra*.

Sir:

The existing position of draft beer salesman has been vacated by the employee hired to replace you when you abandoned the position to engage in strike activities. Therefore, as an economic striker with a claim to reinstatement to employment with the Company, we now make you an offer of reinstatement as draft beer salesman.

We will discuss the details of this position and your reinstatement with you in a personal conference. For this purpose we will meet with you on February 28, 1980, at 10:00 a.m. o'clock at the Company offices. If this date or time is not convenient, please call me and arrange another time.

There was not a new vacancy. Huffman still had the job of draft salesman although listed as "temporary" in Respondent's files.

Clonch went to the office at the appointed hour where he was met by Whittington and Harry Padley.[5] That meeting was recorded by Respondent. The stipulated transcript opens with Whittington saying "Dennis, we are offering you your job back as draft beer salesman. Are you interested?" Clonch asked for 2 weeks to consider the matter because a change in jobs would involve divesting himself of his interest in the service station. Padley and Whittington agreed to give 2 weeks for Clonch to consider the matter then:

MR. PADLEY: have nothing else, do you have anything else Jim?

MR. WHITTINGTON: don't have anything. Do you have any questions or anything, Dennis?

MR. CLONCH: No, uh as I say, I just, well I'm sorry we got the misunderstanding the last time. I thought you said I [sic] had to know the next day. Of course that was my understanding you know. Dean spoke up and he said "You've got till tomorrow," you know. You remember he saying that over there; he said "You've got till tomorrow to make up your mind." I said golly, you know.

MR. PADLEY: We don't argue about that. We'll make as a matter of fact, that was in the statements made by Jim and Dean to the investigator from the NLRB, that, all we wanted from you was a statement within the twenty four hours as to whether you were interested.

MR. CLONCH: Oh well yeah, I was interested but you know I couldn't I thought well I guess we both got a misunderstanding but you know, I understood well you come in tomorrow, you say O.K. I'll take the job and you're put to work that day. I'm sorry we got that misunderstand but—

MR. WHITTINGTON: We needed to know whether you were interested and gave you twenty-four hours I think that's what we agreed on, would twenty four hours be sufficient, and you said yes and the next morning about 10:30 you came over and said you were not interested.

MR. CLONCH: Well uh as I say the reason for that is you know I couldn't that's putting it on the line pretty good cause it does concern a lot of detail. My wife's involved, my Dad's involved and—

MR. PADLEY: We didn't expect you to come to work.

MR. WHITTINGTON: No.

MR. PADLEY: All we wanted to know was were you interested so we could do some planning.—So we figured that twenty-four hours was a logical period of time in order for you to decide O.K. I'm interested or I'm not interested.

The quotation marks in the transcript are not always correctly placed and Clonch was obviously maladroit in his utilization of pronouns. However, it is clear that Clonch was relating that on October 3, 1979, he had gotten an ultimatum to decide within 24 hours if he would accept reinstatement. Clonch's recitation was unchallenged by Whittington and even conceded to be corrected by Padley. It is further true that Clonch had agreed that "that's putting it on the line pretty good" when Whittington related that Clonch had agreed to the 24-hour limitation, but, assuming that the response by Clonch was an admission of fact, it is clear that any "agreement" to the 24-hour deadline, and the response within that period, came only after the ultimatum by Whittington and Johnson. Furthermore, had Clonch freely decided to decline the offer of reinstatement, there would have been no necessity for him to have left his service station and go to Respondent's office to tell them of that fact on October 4. He need only have done nothing. The only logical reason for Clonch's going to the office on October 4 was, as he testified, to plead for more time to consider the matter.

Other logical problems are inherent in Respondent's position that Clonch agreed freely to the 24-hour deadline. If Respondent had really believed that it had made an effective offer of reinstatement on October 3, 1979, it would not have made a reoffer in the first place.[6] Additionally, Whittington logically would have recited a belief that his prior offer was valid in his letter of February 22 and at some point during the meeting on February 28. Specifically, during the February 28 meeting either Whittington or Padley would logically have claimed that they had made a valid offer before, rather than leaving Clonch's statements unchallenged or conceding that they were essentially correct.

Accordingly, I find and conclude that Respondent did not validly offer Clonch reinstatement on October 3, 1979, as Respondent did not give Clonch a reasonable period of time to consider the offer made that date.

Clonch did freely decline the valid offer of reinstatement first made in Respondent's letter of February 22, 1980.

D. *Refusal To Reinstate Ben F. Staley on October 4*

When Clonch refused the offer, herein found legally inadequate, of reinstatement to the job of draft beer salesman, Respondent promoted the reinstated ware-

[5] Padley was not specifically identified. Presumably he is related to coowner Joan Padley and it is clear from the context and content of the February 28 meeting that he was present as an agent of Respondent.

[6] Cf. *West Side Plymouth, Inc.*, 170 NLRB 686, 692 (1968).

houseman Kenneth Roy Huffman to that job rather than reinstating Ben F. Staley. Staley was a package salesman at the time the strike started but had worked as a draft beer salesman from 1967 to 1972. The General Counsel contends that since Staley had worked at the job of draft beer salesman in the past and was undisputedly qualified to perform it, Staley should have been offered the draft beer salesman job and it was a violation of his *Laidlaw* rights not to have done so. As authority for this proposition, the General Counsel cites *Aluminum Cruiser, Inc.*, 234 NLRB 1027 (1978), which, in turn, cites *Brooks Research & Manufacturing, Inc.*, 202 NLRB 634, 635–636 (1973), where it was held that:

> . . . economic strikers who unconditionally apply for reinstatement when their positions are filled by permanent replacements are entitled to full reinstatement upon departure of replacements or *when jobs for which they are qualified become available* . . . ."

In this case the General Counsel contends, and I agree, that the jobs of draft salesmen and package salesmen are not substantially equivalent jobs. In *Aluminum Cruisers* and *Brooks Research* the jobs which the unreinstated strikers sought were substantially equivalent to those left open by the departure of the replacements. The distinction is critical as an employer has no duty to offer strikers' jobs which are not equivalent to those previously held. *New Era Electric Cooperative, Inc.*, 217 NLRB 477 (1975).

My reasons for concluding that the jobs of draft salesmen and package salesmen are not substantially equivalent are the following:[7] (1) The annual earnings of package salesmen were approximately double that of draft beer salesmen. (2) Until the events of this case, when Respondent made unilateral changes (herein found unlawful), all package salesmen had helpers and did little or no lifting; draft beer salesmen had to regularly lift kegs of beer weighing as much as 160 pounds. (3) The package salesmen had no training program; their primary function was salesmanship and driving the trucks. The draft beer salesmen had to have extensive training, sometimes provided by the national brewery for which Respondent distributes beer. This training, whether provided by the brewery or by on-the-job training, involved how to tap, connect, and clean beer lines, and the physics of getting the beer from the keg through and out the spout. Nothing like that was involved in the selling of package beer. (4) After the package salesman completed his route, he was free to leave in the evening; the draft salesman had to remain until approximately 5 a.m. (5) The package salesman did not load and unload his truck; the draft beer salesmen did both. (6) The package salesman did not get his hands or clothes dirty in his work; the draft salesman, in handling the kegs and pumping equipment, did. (7) The package salesmen normally are trained as draft beer salesmen; no draft beer salesman had previously been a package salesman (a point particularly important in considering Respondent's failure to return Staley as a draft beer salesman). (8) The driver salesman is paid by straight commission; the draft salesman receives a salary plus commission.

For all of these reasons, and others described by credible employee testimony not necessary to detail here, I find that the jobs of draft salesmen and package salesmen are not substantially equivalent. Therefore, there was no violation of the Act in Respondent's refusal to reinstate Staley as a draft salesman after strike-replacement Anthony departed and Clonch declined the (inadequate) offer of the job. *New Era Electric Corp., supra.*

E. *Offers of Draft Salesman Jobs to Teague, Staley, and Gryder in March 1980*

The complaint in Cases 11–CA–8048 and 11–CA–8713, which issued on December 28, 1979, alleges at paragraph 10:

> Respondent, on or about October 4, 1979, has further failed and refused to properly reinstate its employees Dennis W. Clonch, or in the alternative its employee Benjamin F. Staley, to their former or substantially equivalent positions of employment.

Since, as discussed above, Clonch had been a draft salesman and Staley had been a package salesman, and since Respondent apparently became aware of *New Era Electric Corp., supra*, Respondent logically concluded that the General Counsel was then taking the position that the jobs of draft salesman and package salesman were substantially equivalent. Just when this conclusion was reached by Respondent is unknown, although it was obviously after Huffman was made draft beer salesman upon Clonch's declining the offer of that job. It was also before March 18, 1980, because on that date Whittington, in writing, offered Staley the draft salesman's job (although it was then held by Kenneth Roy Huffman)[8] and asked Staley to come to Respondent's office to discuss the matter. On March 31, Staley and Union Representative Sherrill and Teague met with Danny Green (not otherwise identified), Harry Padley, and Jimmy Whittington at the latter's office. At that meeting Whittington orally offered the draft salesman job to Staley unconditionally. Staley declined stating essentially that he considered the job not to be equivalent to the package salesman job he had before. Whittington responded that according to the advice they had received from their attorney, the NLRB had ruled that the jobs were equivalent. During this meeting, a transcript of which was received in advance, no offer was made to Teague.

On April 1, Whittington sent Teague a letter offering reinstatement to Teague as a draft salesman and asking him to meet with the Company to discuss the matter.

On April 11, Teague and Staley went to Respondent's office where Teague served upon Whittington a letter re-

[7] My factual findings in this regard reply principally on the credible testimony of employees who testified as how the two jobs were actually performed, and I discredit Whittington's contrary testimony.

[8] As noted above, Huffman was carried as "temporary" draft salesman on Respondent's records from the time he was promoted to the job when Clonch declined it on October 4, 1979. Whittington defined "temporary" in terms that ordinarily are used to connote "probationary," and the term "temporary" (at least by the time of the offer to Staley) was essentially meaningless.

fusing reinstatement because: "I do not believe your recent offer constitutes substantial [sic] equivalent employment." Staley, although he had already verbally refused the offer extended March 31, also served Whittington with a letter which was substantially identical to that of Teague's.

On April 14, 1980, Whittington sent a letter to former package salesman Gryder offering him the draft salesman job. Gryder responded with a letter stating that he declined the job as draft salesman, "since I was a package beer salesman at last employment."

Respondent contends that the jobs of package salesman and draft salesman are substantially equivalent and that the General Counsel had conceded this fact by the wording of the complaint issued on December 29, 1979, as quoted above. From this deduction, Respondent contends that it satisfied its obligations to Staley, Teague, and Gryder by its March 1980 unconditional offers of reinstatement to the job of draft salesmen.

While the clear implication of the wording of the complaint was that the General Counsel considered the jobs equivalent, the decision of the Board must necessarily rest on the facts and the law, and not some preliminary position of the General Counsel. Respondent was compelled to follow the law which controls what is ultimately decided to be fact and is not excused by what it deduces (however logically) from the preliminary positions of the prosecution.

Since I have found that the jobs of draft salesmen and package salesmen are not substantially equivalent, it necessarily follows that by offering the job of draft salesman to Teague, Staley, and Gryder, Respondent did not relieve itself of the statutory obligation to offer the position of package salesman to those three former strikers when such later became open. *The Laidlaw Corporation, supra.*

F. *Failure To Offer Package Sales Jobs to Teague, Staley, and Gryder in May and July 1980*

On May 19, 1980, because of an increase in business, Respondent created a fourth package route. On June 2, a previously existing package route was left vacant when striker-replacement Charles Bell resigned. On July 3, a third vacancy was created when a fifth package route was established. Because Respondent believed it had satisfied its obligation to offer substantially equivalent positions to Teague, Staley, and Gryder, none of these package routes were offered to those former strikers.

The fourth package route was given to Jerry Anderson on May 19 who was assigned to the route without a helper, but was paid 18 cents per case.[9] Bell's route was filled permanently on July 21 by Gary Walsh who had been hired on August 19, 1979, as a helper-warehouseman, a position he held until July 21, 1980. (Just who serviced that route temporarily between June 2 and July 21 is not disclosed by the record.) Walsh was given the commission of 13 cents per case, not 18 cents, because he was assigned a helper. The newly created fifth package route was assigned on July 3 to Oliver Eugene Gant who had been hired May 1, 1978, and who had been working as a warehouseman-helper. Gant was paid 18 cents per case and was assigned to do his route without a helper.

As well as Anderson's package route, the package routes of striker replacements Bobby Williams and Garry LeHardy were restructured on May 19 by Respondent's raising their commission to 18 cents per case and removing their helpers. (Therefore, no route, except Walsh's, had a helper at the time of the hearing because the newly created route of Gant had no helper.)

It is undisputed that Respondent bargained with the Union neither about the increase in commissions nor the abolution of the job of helper on the four routes affected by the May 19 action of Respondent.

It is clear under *Laidlaw* that since, as I have found herein, Respondent did not extinguish its reinstatement obligations to the three unreinstated package salesmen by its offers of the draft sales routes in March 1980, it had a duty to offer any vacancy created thereafter in the position of package salesman. Specifically, when Respondent created a new route on May 19, it violated the rights of Staley under Section 8(a)(1) and (3) of the Act by assigning Anderson to the route rather than Staley who was qualified and awaiting reinstatement. See *MCC Pacific Valves; a unit of Mark Controls Corporation*, 244 NLRB 931 (1979), wherein the Board discusses this issue and approved of the holding in *Crossroads Chevrolet, Inc.*, 233 NLRB 728 (1978). By the same token Respondent violated the Act by assigning warehouseman Gant to the route newly created on July 3 in preference to Teague; and it again violated Section 8(a)(1) and (3) of the Act when on July 21 it permanently assigned Walsh to Bell's route in preference to Gryder who also was then still awaiting reinstatement pursuant to the Union's unconditional offer to return to work made November 21, 1977.

G. *Alleged Unilateral Actions*

On August 4, 1978, September 3, 1979, and in May 1980, Respondent granted wage increases to the strike replacements and Clyde Huffman. The General Counsel contends that these wage increases and other unilateral actions constitute violations of Section 8(a)(5). Respondent contends that the allegations regarding the August 4, 1978, wage increase is time-barred because no charge was filed thereupon until October 29, 1979. Union Representative Sherrill denied actual knowledge of the 1978 (and 1979) wage increases, and replacements Bell and Foster credibly testified that they were instructed by Whittington and Johnson to keep word of their increases from strikers when said wage increases were granted. Respondent rejoins that the Union participated in the negotiation of the November 22, 1978, settlement of the charges in Cases 11-CA-7182 and 11-CA-7619 (pursuant to which warehousemen Kenneth Roy Huffman and Ricky Pierce were reinstated), and since that settlement

[9] Anderson was a strike replacement who had been working as a warehousemen-helper and who, during the spring of 1980, worked 1 or 2 days a week as a "fill-in" package sales driver. Other warehousemen-helpers worked as temporary package salesmen during that spring and summer. Since these temporary jobs were substantially equivalent to those of full-time package salesmen, Respondent did not violate the Act by failing to offer the temporary jobs to the former strikers awaiting reinstatement as full-time package salesmen. *New Era Corp., supra.*

called for backpay, the Union presumably had notice of the wage increases, at least as to those given the warehousemen.

I need not determine the validity of Respondent's defense based on the limitations period of Section 10(b) of the Act because, after discussing this defense, the General Counsel in his brief, p. 15, states:

> The second defense Respondent maintains is that due to an impasse in bargaining reached between the parties in September 1977, the subsequent pay raises of September 1978 and 1979 are not violative because said wage increases were not different from or greater than those offered to union when the contended impasse was reached. This argument does not apply to the May 1980 pay raise as it was clearly greater in amount than any wage offer ever made to the Union.

By the last sentence just quoted, the General Counsel, in effect, concedes that the 1978 and 1979 pay increases *were* within Respondent's final offer, a fact reflected by payroll records in evidence. Since I have found there existed at the time of the 1978 and 1979 wage increases an impasse, Respondent's granting them unilaterally did not violate Section 8(a)(5) of the Act (whether a charge was timely filed thereupon or not). *Taft Broadcasting Co. WDAF AM-FM TV*, 168 NLRB 475 (1967).

Conversely, Whittington admitted that the May 1980 wage increases[10] were not within Respondent's January 7, 1977, proposal which turned out to be its final offer. As stated by the Supreme Court in *N.L.R.B.* v. *Benne Katz, d/b/a Williamsburg Steel Products*, 369 U.S. 736, 745 (1962):

> But even after an impasse is reached [an employer] has no license to grant wage increases greater than any he has ever offered the union at the bargaining table, for such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union.

Therefore, Respondent's unilateral granting of the 1980 wage increase was violative of Section 8(a)(5) unless it is excused because a decertification petition had been filed on January 19, 1979, and was still pending at the time of the hearing herein, as Respondent further argues. Respondent relies on *Telautograph Corporation*, 199 NLRB 892 (1972), in which an employer was held not to be in violation of the Act by refusing to bargain for the renewal of a contract covering a unit which was the subject of a pending decertification petition. However, there is absolutely no basis for asserting that *Telautograph* licenses unilateral action, as opposed to a refusal to enter plenary contract negotiations.

Accordingly, I find that the decertification petition did not license Respondent to implement wage increases greater than those offered to the Union on September 27, 1977, and its having done so in May 1980 violated Section 8(a)(5) of the Act.

It is further undisputed that, in May 1980, Respondent, without notice to or bargaining with the Union, created new driver sales routes, altered existing routes, created new delivery routes, and abolished the helper position for four of its five package sales delivery routes. As Respondent's *Telautograph* defense to the 1980 unilateral wage increase fails, so does its defense to the 8(a)(5) allegation based on these changes. Accordingly, I find and conclude that by the institution of these changes Respondent also violated Section 8(a)(5) of the Act.

Upon the basis of the above findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate under the Act for the purposes of collective bargaining:

> All warehousemen and distribution employees, including drivers, driver salesmen, warehousemen and helpers employed at Respondent's North Wilkesboro, North Carolina, facility, excluding office clerical employees, and guards and supervisors as defined in the Act.

4. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the unit described in paragraph 3 of this section.

5. Since on or about May 15, 1980, and continuing thereafter, Respondent has, by the following acts and conduct, refused to bargain collectively in good faith concerning wages, hours of employment, and other terms and conditions of employment for the employees in the unit described above in violation of Section 8(a)(5) of the Act:

(a) Unilaterally and without prior notice to or consultation with the Union instituting wage increases in May 1980.

(b) Altering existing employee delivery routes, creating new employee delivery routes, and removing the helpers from package sales delivery routes on or about May 12, 1980.

6. Respondent violated Section 8(a)(1) and (3) of the Act when it failed on October 4, 1979, to offer reinstatement to Dennis Clonch.

7. Respondent violated Section 8(a)(1) and (3) of the Act when, beginning May 12, 1980, it refused to offer vacancies created by new jobs and the departure of strike replacements to qualified strikers Benjamin F. Staley, Eddie Teague, and Robert Gryder who were then awaiting reinstatement in preference to strike replacements who were then on the payroll.

8. Respondent has not, except as specifically found above, violated the Act as alleged in the complaint.

[10] The 18-cent-per-case commission for the four package salesmen was 5 cents more than the offer to the Union. The amount of wage increases granted to the other employees is not disclosed by the record herein. However, determination of the exact difference would not affect the scope of the remedy herein.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall be ordered to offer reinstatement to strikers Benjamin F. Staley, Eddie Teague, and Robert Gryder, but not Dennis Clonch, who declined a valid reinstatement made by Respondent on February 22, 1980. Respondent shall also be required to make whole Staley, Teague, and Clonch for any losses of pay they may have suffered by reason of Respondent's discrimination against them; such payment to be made in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977); see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and conclusions of law and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

The Respondent, Forester Beverage Corporation, North Wilkesboro, North Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive bargaining representative of employees in the bargaining unit found appropriate herein.

(b) Unilaterally instituting wage increases, altering or establishing new delivery routes, or abolishing unit positions.

(c) Refusing to offer initial job vacancies created by new jobs or the departure of strike replacements to qualified unreinstated strikers in preference to strike replacements on the payroll.

(d) Unilaterally and without prior notice to or consultation with the Union making changes in the wages, hours, or other terms and conditions of employment of employees in the bargaining unit found appropriate herein.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer to employees Eddie Teague, Benjamin F. Staley, and Robert Gryder immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make those employees and former employee Dennis W. Clonch whole for any loss of earnings they may have suffered by reason of the discriminatory failure to reinstate them in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Upon request, meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the unit found appropriate herein.

(c) Upon request by the Union, rescind all unilateral actions found unlawful herein and bargain with the Union about any subsequent changes in the wages, hours, and terms and conditions of employment of the employees in the unit found appropriate herein.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its North Wilkesboro, North Carolina, facilities copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all prurposes.

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."